

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH F. MANDOLI,
Plaintiff,
v.

No. CS-02-225-FVS

ORDER

CRAIG THAYER and STEVENS COUNTY,
Defendants.

THIS MATTER comes before the Court based upon the plaintiff's motion to alter or amend judgment. The plaintiff is represented by Steven C. Lacy. The defendants are represented by Michael E. McFarland, Jr.

BACKGROUND

Joseph F. Mandoli was accused of misconduct while employed by the Stevens County Sheriffs Office ("SCSO"). Sheriff Craig Thayer ordered an investigation. Prior to a hearing on the allegations, Mr. Mandoli agreed to resign his job and release his claims against the SCSO. In exchange, representatives of the SCSO agreed to limit the information the SCSO would disclose to prospective employers. Not long after resigning his position, Mr. Mandoli applied for a job with the Douglas County Sheriffs Office ("DCSO"). He was not hired. Some time later, he obtained the contents of the file maintained by the DCSO concerning his application for employment. One of the items in the file is a set of handwritten notes. They were prepared by DCSO

1 Captain Donald E. Culp in connection with a conversation he had with
2 Sheriff Thayer. The notes indicate Sheriff Thayer made a number of
3 critical comments about Mr. Mandoli, who claims the comments are
4 defamatory as a matter of state law. The defendants move for summary
5 judgment.

6 **RULING**

7 Captain Culp's notes are the sole evidence concerning Sheriff
8 Thayer's comments. The defendants give four reasons why, in their
9 opinion, his notes do not raise a genuine issue of material fact with
10 respect to the existence of defamation: (1) his notes are
11 inadmissible hearsay; (2) his notes do not prove Sheriff Thayer made
12 a false statement about Mr. Mandoli; (3) Sheriff Thayer had an
13 absolute privilege to say whatever he may have said; and (4) Captain
14 Culp's notes do not reflect actual malice.

15 A. Hearsay

16 Sheriff Thayer's oral statements to Captain Culp are not hearsay
17 because Sheriff Thayer is a party opponent. Fed.R.Evid. 801(d)(2).
18 By contrast, Captain Culp's notes concerning Sheriff Thayer's oral
19 statements are hearsay because the notes are being offered to prove
20 the truth of the statements contained therein. Fed.R.Evid. 801(c).
21 The issue, then, is whether the notes fit within an exception to the
22 hearsay rule. Perhaps the most promising exception is Rule 803(8),
which authorizes the admission of:

23 Records, reports, statements, or data compilations, in any
24 form, of public offices or agencies, setting forth (A) the
25 activities of the office or agency, or (B) matters observed
26 pursuant to duty imposed by law as to which matters there
was a duty to report, excluding, however, in criminal cases
matters observed by police officers and other law
enforcement personnel, or (C) in civil actions and
proceedings and against the Government in criminal cases,

1 factual findings resulting from an investigation made
2 pursuant to authority granted by law, unless the sources of
3 information or other circumstances indicate lack of
4 trustworthiness.

5 There are some circumstances that support the notes' admissibility.
6 Captain Culp was collecting information concerning a job applicant,
7 which is a routine function for a public agency. Although note-
8 taking involves interpretation and editing, Culp's conversation with
9 Thayer was non-adversarial. Moreover, it was in Culp's interest to
10 take accurate notes so the DCSO could make an informed decision
11 concerning Mr. Mandoli's suitability for employment. Thus, while the
12 admissibility of Culp's notes is a very close question, they arguably
13 fall within the scope of Rule 803(8).

14 B. Reconstructing the Conversation

15 The defendants submit that Mr. Mandoli has not provided enough
16 information for a reasonable jury to find that Sheriff Thayer made a
17 false statement to Captain Culp. The defendants have a point.
18 Captain Culp's declaration is very brief. However, the evidence must
19 be viewed in the light most favorable to Mr. Mandoli. See *T.W.*
20 *Electric Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809
21 F.2d 626, 630 (9th Cir.1987). In that regard, significant inferences
22 may be drawn from the second and third sentences of Culp's notes.
23 See *id.* at 631 (non-moving party is entitled to the benefit of all
24 inferences that have a rational basis in fact). The second sentence
25 states, "He strongly recommends we come look at his file if we are
26 considering hiring him." Read in light of the record as a whole,
this sentence implies Sheriff Thayer urged Culp to review Mr.
Mandoli's personnel file at the SCSO. The third sentence of Culp's
notes states, "Highlights are as follows:". This sentence implies

1 that Sheriff Thayer went on to describe the contents of Mr. Mandoli's
2 personnel file and that Culp took notes as he did so. Indeed, from
3 this point on, Culp's notes set forth a series of statements that
4 seem to reflect Sheriff Thayer's recollection of the information
5 contained in Mr. Mandoli's personnel file. Admittedly, Culp's notes
6 do not constitute a word-for-word record of Sheriff Thayer's
7 comments. Nevertheless, Culp's notes are sufficiently detailed that
8 a reasonable jury could reconstruct much of what Sheriff Thayer said.

9 C. Privilege

10 The Supreme Court of the Washington has recognized that
11 allegedly defamatory statements may be protected by either an
12 absolute or a qualified privilege. *Bender v. Seattle*, 99 Wn.2d 582,
13 600, 664 P.2d 492 (1983). Statements made by law enforcement
14 officers to the press and public are protected only by qualified
15 privilege. *Id.* at 601. The defendants have not cited a case in
16 which a Washington appellate court has held that statements such as
17 the ones at issue here -- *i.e.*, a high-ranking law enforcement
18 officer's comments to a colleague in another law enforcement agency
19 concerning an applicant's suitability for employment -- are protected
20 by an absolute privilege. Thus, at this juncture, it must be assumed
such statements are protected only by a qualified privilege.

21 D. Actual Malice

22 A speaker loses a qualified privilege if he makes a false
23 statement with actual malice. *Id.*; *Wood v. Battle Ground Sch. Dist.*,
24 107 Wn. App. 550, 569-70, 27 P.3d 1208 (2001). Whether Sheriff
25 Thayer abused his privilege to speak candidly with Captain Culp
26 depends upon exactly what he said. As the record now stands, genuine
issues of material fact exist with respect to whether Sheriff Thayer

1 made false statements to Captain Culp and, if so, whether Sheriff
2 Thayer's statements reflect actual malice.

3 **IT IS HEREBY ORDERED:**

4 1. The plaintiff's motion to alter or amend judgment (Ct. Rec.
5 71) is granted in part. He may proceed with his state-law defamation
6 claim.

7 2. Within seven days of entry of this order, counsel are to
8 **jointly** confer with Kellie Higginbotham regarding a trial date. All
9 discovery should be complete.

10 **IT IS SO ORDERED.** The District Court Executive is hereby
11 directed to enter this order and furnish copies to counsel.

12 **DATED** this 19th day of May, 2005.

13 s/ Fred Van Sickle
14 Fred Van Sickle
15 Chief United States District Judge
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